Supreme Court, U.S.
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No. 94-1447

In The

Supreme Court of the United States

October Term, 1994

ALEXANDER SALKIND,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

Real Parties in Interest Jane Chaplin, Ilya Salkind and Robert Simmonds

Petition For A Writ Of Certiorari To The Supreme Court For The State Of California

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Counsel of Record for
Real Parties in Interest:
ELIHU M. BERLE
Other Counsel:
STEPHEN CHRYSTIE
DAVID BOYLE
CHRYSTIE & BERLE
A Professional Corporation
1925 Century Park East, Suite 2200
Los Angeles, California 90067-2723
(310) 788-7700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I.

PRELIMINARY PROCEDURAL STATEMENT

On November 23, 1993, Plaintiffs and Real Parties in Interest Jane Chaplin, Ilya Salkind and Robert Simmonds (collectively referred to herein as "Plaintiffs") commenced an action in the California Superior Court by filing a Complaint against Petitioner Alexander Salkind ("Petitioner") and others, including several shell corporations controlled and dominated by Petitioner, for breach of contract, fraudulent misrepresentation, tortious breach of the covenant of good faith and fair dealing, conversion, conspiracy to defraud, and other related causes arising out of the production and financing of the motion picture entitled "Christopher Columbus: The Discovery" (the "Film"), which was distributed, exhibited and produced in part in California. Plaintiffs seek damages in excess of $8,500,000.

Petitioner filed a motion to quash service of summons, objecting to the jurisdiction of the California Superior Court.[1] After reviewing numerous declarations containing literally thousands of pages of documentary

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[1] Defendants Great Krypton Productions, Inc., Kandor Productions, Inc. and Superboy Productions, Inc. also filed a motion to quash but subsequently withdrew their motion and the trial court entered their defaults. Two other Defendants, James Lanyon and Peel Enterprises, Ltd., filed motions to quash that were heard the same day as Petitioner's motion. The trial court granted their motions to quash on September 21, 1994.

evidence, including the transcript of Petitioner's deposition, Honorable Ricardo A. Torres, Judge of the California Superior Court, found that Petitioner, in his individual capacity and through his agents, representatives and shell corporations, engaged in business in California on a steady and substantial basis throughout his long career in the entertainment industry. [App. R8-18, items 7-49].[2] As a consequence, the trial court concluded that Petitioner was engaged in a continuous substantial stream of business in California to subject him to the jurisdiction of the state. In denying Petitioner's motion to quash on September 21, 1994, the trial court stated:

> This – this ruling's only as to defendant Salkind [Petitioner]. The motion to quash service of summons is denied. I don't find any problem with the summons and the complaint were properly served on the – on the defendant.
>
> This court – the court finds that this court has general jurisdiction over the defendant. To establish general jurisdiction, the plaintiff must show the Defendant Salkind has continuous and systematic contacts with California.
>
> The plaintiff has provided facts showing that, one, defend – defendant has advertised, distributed and exhibited at least nine films in California; two, the defendant maintains contacts with an entertainment transaction attorney in California; three, the defendant often contacts people in California – California residents in regard to –

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[2] Citations to "App." are references to appendices attached to the Petition for a Writ of Certiorari filed by Petitioner on or about February 27, 1995.

> for writers, directors, merchandising rights, et cetera.
>
> The – four, defendant contract in California to be a consultant for Warner Brothers; five, the defendant conducted his production business through many corporations in California. And while it's true that the defendant does not reside in California and may only rarely come physically to California, he does significant – significant and continuous business as a motion picture producer within California to telephone facts [*sic*], et cetera.
>
> California law provides that due process does not require the defendant to be physically present in California, and he is subject to general jurisdiction in this state. [Transcript of hearing of September 21, 1994, App. D].

Seeking appellate review of the trial court denial of his motion to quash, Petitioner filed with the Court of Appeal of the State of California a Petition for Writ of Mandate and for Emergency Stay of Proceedings. [App. R]. In connection with the filing of the Petition for Writ of Mandate, Petitioner filed with the Court of Appeal the record of the trial court below which constituted exhibits with over 2,500 pages. [App. R8-18].

This voluminous record in the trial court unequivocally establishes that Petitioner, in his individual capacity, is the "presenter," "executive producer" and "producer" of motion pictures that have been advertised, exhibited and generated revenues in California. [Declaration of Ilya Salkind ("Ilya Decl."), App. L2; Declaration of Robert Simmonds ("Simmonds Decl."), App. M2-5; Declaration of Kathleen Henderson ("Henderson Decl."), App. K1-4].

Specifically, the evidence demonstrates that Petitioner is the producer of a substantial number of major motion pictures, including the successful "Superman" series, which have been distributed since late 1973 throughout the world, including California, and which motion pictures have generated revenue from movie theaters in California, from sales of video cassettes in California and from free television and cable television broadcasts throughout California. [Ilya Decl., App. L2-3; Simmonds Decl., App. M2-5; Henderson Decl., App. K1-4; Declaration of Joel Kabakoff ("Kabakoff Decl."), App. N1-3]. Additionally, the record is uncontroverted that Petitioner maintains continuous and systematic communications with studio executives and entertainment attorneys in California. [Declaration of John Schulman ("Schulman Decl."), App. J1-2; Declaration of Walter S. Teller ("Teller Decl."), App. O1-2; Ilya Decl., App. L3-7; Simmonds Decl., App. M4-8]. It is further undisputed that Petitioner was the guarantor of specific written agreements entered into in California, which provided for interpretation under California law and resolution of disputes by litigation in California. [Ilya Decl., App. L9; Simmonds Decl., App. M13-15]. Finally, the facts are without controversy that Petitioner entered into several settlement agreements arising out of lawsuits in California in which Petitioner not only agreed that the agreements would be interpreted under California law, but also specifically consented to personal jurisdiction in California. [Ilya Decl., App. L8-9; Simmonds Decl., App. M14-15].

After reviewing the thousands of pages of documentary evidence, including the transcript of the deposition of Petitioner, the California Court of Appeal denied the

Petition for Writ of Mandate. [App. B]. Thereafter, Petitioner sought further appellate review by the California Supreme Court, which denied a Petition for Review. [App. A].

As hereinafter will be demonstrated, the maintenance of California jurisdiction based upon Petitioner's continuous substantial stream of business in the state is appropriate and does not in any manner violate the Due Process or Equal Protection Clauses of the United States Constitution. Moreover, California's appellate review procedures and denial of the Petition for Writ of Mandate by the California Court of Appeal, after consideration of thousands of pages of documentary evidence, did not deny Petitioner of meaningful review, due process or equal protection. [App. R8-18, items 7-49].

II.

SUMMARY OF ARGUMENT

1. Since the overwhelming uncontested evidence presented to the trial court established unequivocally that Petitioner maintains substantial, systematic and continuous contacts with California, the exercise of *in personam* jurisdiction by California satisfies the requirements of the Due Process Clause of the United States Constitution.

2. California's statutory procedure for expeditious appellate review of a trial court's denial of a motion to quash through a petition for writ of mandate is rationally related to a legitimate state interest in providing prompt appellate review and preserving judicial resources, so as to satisfy the requirements of the Equal Protection Clause of the United States Constitution.

3. California's statutory procedure for expeditious appellate review of a trial court's denial of a motion to quash provides litigants, without discrimination, an opportunity to seek appellate review in an efficient economical manner.

III.

CALIFORNIA JURISDICTION OVER PETITIONER IS MANDATED BY THE OVERWHELMING EVIDENCE AND CONTROLLING LEGAL AUTHORITY

A. Petitioner's Continuous and Systematic Personal Business Contacts with the State of California.

California's long-arm statute " 'manifests an intent to exercise the broadest possible jurisdiction' " over a non-resident. *Jones v. Calder*, 138 Cal.App.3d 128, 132, 187 Cal.Rptr. 825, 828 (1982) (citations omitted), *aff'd*, 465 U.S. 783, 104 S. Ct. 1482 (1984). The only limitation on the authority of California to assert jurisdiction over a non-resident is the prerequisite that the party "have certain minimum contacts with [California] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945) (citations omitted).

Where there are "sufficient contacts" between the state and the non-resident, due process is not offended by the state's subjecting the party to its *in personam* jurisdiction, even when the underlying cause of action does not directly arise out of a non-resident's activities in the forum state. *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872 (1984) (*citing*

Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 72 S. Ct. 413 (1952)). In *Helicopteros* and *Perkins*, this Court held that when non-residents carry on a continuous and systematic part of their general business in the forum state it is reasonable and just for a state to exercise jurisdiction over non-residents on claims unrelated to their forum activities. *Helicopteros*, 466 U.S. at 415, 104 S. Ct. at 1872; *Perkins*, 342 U.S. at 445, 72 S. Ct. at 418.

In acknowledging the substantial relaxation in modern times of constraints on state jurisdiction under the Due Process Clause, this Court observed in *McGee v. International Life Ins. Co.*, 335 U.S. 220, 78 S. Ct. 199 (1957):

> "Looking back over this long history of litigation a trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations *and other non-residents*.[3] In part this is attributable to the fundamental transformation of national economy

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[3] The extension of this Court's "minimum contacts" jurisprudence to individuals is all but required by the Court's rationale of *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). Moreover, not only did the *International Shoe* court rely on cases involving individuals to formulate its decision, but the specific language of the oft-quoted minimum contacts test articulated by this Court compels the application of the "minimum contacts" criteria to individuals:

> "due process requires only that in order to subject a defendant to a judgment in personam, if *he* be not present within the territory of the forum, *he* have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Id. at 316, 66 S. Ct. at 158 (emphasis added) (citations omitted).

> over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

Id. at 222-23, 78 S. Ct. at 201 (emphasis added).

Twenty-three years after *McGee*, this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559 (1980), recognized that "[t]he historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided." *Id.* at 292, 100 S. Ct. at 565.

The unrefutable compelling 2,500 pages of evidence presented to the California trial court, Court of Appeal and Supreme Court in this case established conclusively that Petitioner is engaged in systematic and steady business in California to subject him to the jurisdiction of the courts of the state. [App. R8-18, items 7-49].

It is acknowledged that Petitioner generated substantial gross income for himself through the distribution and exhibition of his films throughout California. Among Petitioner's motion picture productions are the following films: (a) "Christopher Columbus: The Discovery"; (b) "Superman: The Movie"; (c) "Superman II"; (d) "Superman III"; (e) "Supergirl"; (f) "Santa Claus: The Movie"; (g) "The Three Musketeers"; (h) "The Four Musketeers"; (i) "The Prince and the Pauper"; (j) "Bluebeard"; (k)

"Austerlitz"; (l) "The Trial"; (m) "Cervantes"; (n) "Rape of the Sabines"; (o) "Black Jack"; and (p) "The Light at the Edge of the World." [Ilya Decl., ¶ 3, App. L2; Simmonds Decl., ¶ 6, App. M3 and Exhibit 1 thereto].

Most of the major motion pictures produced by Petitioner were advertised, distributed, exhibited and generated revenue in California through box office sales in thousands of theaters located in California, videocassette sales in thousands of video retail stores located throughout California and free television and cable television broadcasts throughout California. [Ilya Decl., ¶¶ 4-6, App. L2-3; Simmonds Decl., ¶¶ 3, 7 and 9, App. M2-4; Kabakoff Decl., Exhibits 1 through 6, App. N1-3, and videocassettes lodged in connection therewith; Henderson Decl., Exhibits 1 through 8, App. K1-4].

Furthermore, Petitioner, individually, entered into contracts that were to be performed in the State of California. Specifically, Petitioner personally guaranteed performance of contracts in the State of California in the following instances:

(1) Petitioner guaranteed performance by Sumaca Film Distribution, Inc. ("Sumaca") under a contract for Mario Puzo of Los Angeles to write the screenplay for "Christopher Columbus: The Discovery." [Ilya Decl., ¶ 26, App. C10 and Exhibit 4 thereto]. In connection therewith, Petitioner agreed that the contract would be construed under California law and any dispute arising out of the contract would be resolved in Los Angeles. [Ilya Decl., ¶ 26, App. L10 and Exhibit 4 thereto];

(2) Petitioner guaranteed the performance of Sumaca under a contract for John Glen of Los Angeles to

direct the motion picture "Christopher Columbus: The Discovery" (the "Film") [Simmonds Decl., ¶ 23, App. M13-14 and Exhibit 4 thereto]. Petitioner agreed that the contract was to be interpreted according to California law [Simmonds. Decl., Exhibit 4, App. M13-14];

(3) Petitioner guaranteed performance of Peralta Corporation N.V. of a contract with Merchandising Corporation of America of Universal City, California concerning the exploitation of the merchandising rights to "Santa Claus: The Movie" [Ilya Decl., ¶ 30, App. L10-11 and Exhibit 5 thereto];

(4) Petitioner executed a guaranty to Albert G. Ruben & Co. of Los Angeles to secure the promise of Christopher Columbus Productions, Inc. to pay premiums in California for the insurance policy covering the production of "Christopher Columbus: The Discovery" [Simmonds Decl., ¶ 29, App. M15, and Exhibit 7 thereto]; and

(5) Petitioner negotiated a consulting agreement with Warner Bros. in or about August of 1993 relating to the next "Superman" motion picture. [Schulman Decl., App. J1-2, Exhibit 1].[4]

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[4] In Petitioner's consulting agreement with Warner Bros., the following clause appears:

> "*CALIFORNIA LAW APPLIES* This Salkind Consulting Agreement is entered into [sic] the State of California and is to be performed in large part in the State of California. This Salkind Consulting Agreement shall be construed and interpreted in accordance with the laws of the State of California as though made and to be fully performed in the State of California.

Petitioner has also been personally involved in numerous legal proceedings litigated in the State of California. [Ilya Decl., ¶¶ 20 and 22, App. L8-9; Simmonds Decl., ¶ 25, App. M14; Request for Judicial Notice, App. R14, item 36, Exhibits 1 and 2, 19 and 22]. Petitioner entered into at least three (3) settlement agreements providing for Petitioner's consent to the personal jurisdiction of the State of California and the interpretation of the agreements under California law. [Ilya Decl., ¶¶ 21 and 23, App. L8-9; Notice of Lodging, App. R13, item 24; Simmonds Decl., ¶ 25, App. M14, and Exhibit 6 thereto].

Petitioner regularly communicates by telephone with third parties located in Los Angeles, California on a systematic and continuous basis in order to further his personal business in the entertainment industry. For example, according to the Declaration of Walter S. Teller, Petitioner communicated by telephone with his entertainment transactional attorney in Los Angeles, California, on hundreds of occasions over the past five (5) years. [Teller Decl., App. O1-2 and Exhibit A; Schulman Decl., App. J1-2 and Exhibit 1].

Warner and Mr. Alexander Salkind each irrevocably consented that jurisdiction and venue of the Superior Court of the State of California, County of Los Angeles, with a federal district for the Central District of California, as the case may be, and Warner and Mr. Alexander Salkind agreed that service and any such action may be made upon Warner and Mr. Alexander Salkind by service made pursuant to the laws of the State of California and service by such means shall constitute service under the laws of the State of California."

From a review of the uncontested factual record, it is clear that Petitioner's contacts with California are not " 'random,' " " 'fortuitous' " or " 'attenuated' " or " 'the unilateral activity of another person or a third party.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2183 (1985) (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299, 100 S. Ct. 559, 568 (1980); *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873 (1984)). Therefore the courts in California are overwhelmingly justified in the exercise of personal jurisdiction over Petitioner.

In affirming the constitutionality of Florida's long-arm jurisdiction, this Court in *Burger King* observed that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Burger King Corp.*, 471 U.S. at 476-77, 105 S. Ct. at 2184. Since the 1985 *Burger King* case, interstate and transnational business communications have increased exponentially through the advent of the fax machine, "e-mail" and other "information-superhighway" computerized transmittal of data. Thus, the mere contention of Petitioner that he has not physically set foot in California for a number of years cannot overcome the vast uncontroverted compelling evidence that he has engaged in substantial, continuous and systematic business transactions in California to subject Petitioner to jurisdiction of the state. *Id.*

Significantly, the Court in *Burger King* admonished parties such as Petitioner from attempting to manipulate and abuse constitutional standards to avoid contractual obligations: "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Id.* at 474, 105 S. Ct. at 2183.

Since Petitioner purposefully avails himself of the benefits and protections of California by conducting substantial business in the state, he could reasonably anticipate defending litigation in California, thereby satisfying the due process standards of the United States Constitution. Thus, the trial court correctly ruled that Petitioner was subject to the jurisdiction of California courts. *See, e.g., Roth v. Garcia Marquez*, 942 F.2d 617, 622 (9th Cir. 1991) (nonresident screenwriter subject to jurisdiction in California); *Cable/Home Communication v. Network Productions*, 902 F.2d 829, 856 (11th Cir. 1990) (individual television producer amenable to court's jurisdiction since broadcast aired in forum state); *Edy Clover Productions, Inc. v. National Broadcasting Co., Inc.*, 572 F.2d 119, 120 (3d Cir. 1978) (same); *Payne v. Kristofferson*, 631 F. Supp. 39, 43 (N.D.Ga. 1985) (nonresident musical performers within court's jurisdiction); *Davis v. Costa-Gavras*, 595 F. Supp. 982, 985-86 (S.D.N.Y. 1984) (motion picture director subject to court's jurisdiction); *North Dakota v. Newberger*, 188 Mont. 323, 328-29, 613 P.2d 1002, 1005 (1980) (exercise of general jurisdiction over rock promoter); *ABKCO Indus. v. Lennon*, 52 A.D.2d 435, 439-40, 384 N.Y.S.2d 781, 783-84 (1976) (assertion of general jurisdiction over rock star emanating from his exploitation of musical compositions

in United States through his forum attorneys and accountants).

B. Petitioner's Significant Business Contacts in California Through His Authorized Agents and Representatives.

In recognition of the economic reality of the entertainment industry that for major motion pictures produced by Petitioner to be successful they must be distributed in the United States and in California in particular, Petitioner maintains substantial, continuous and systematic contacts with professionals in the entertainment business world in California through his authorized agents and representatives. *See, e.g., Editorial Musical Latino Americana v. Mar Int'l Records, Inc.*, 829 F. Supp. 62, 66 (S.D.N.Y. 1993); *ABKCO Indus. v. Lennon*, 52 A.D.2d 435, 439-40, 384 N.Y.S.2d 781, 783-84 (1976). Specifically, Petitioner's agents personally visit California and engage in communications by telephone and by fax machine to the state with: (1) major motion picture studios to solicit and negotiate distribution of Petitioner's film productions in the United States; (2) actors, directors and below-the-line production personnel to negotiate and formalize agreements to retain their services for Petitioner's productions; (3) talent agents to negotiate and formalize contracts to retain the services of actors, directors and below-the-line personnel for Petitioner's productions; and (4) entertainment attorneys to negotiate and formalize transactions relating to financing, production and distribution agreements of Petitioner's films productions. [Ilya Decl., ¶¶ 7-19, 24 and 28, App. L3-7, L9-10 and Exhibits 1 through 5 thereto; Simmonds Decl., ¶¶ 10-21, 27, 30, 33

and 38, App. M4-13, M15-17 and Exhibits 1 through 8 thereto].

As a matter of law, an agent's contacts with California are imputed to the principal for purposes of determining a court's personal jurisdiction over the principal. *Editorial Musical Latino Americana v. Mar Int'l Records, Inc.*, 829 F. Supp. 62, 66 (S.D.N.Y. 1993); *ABKCO Indus. v. Lennon*, 52 A.D.2d 435, 439-40, 384 N.Y.S.2d 781, 783-84 (1976). The overwhelming evidence submitted to the California Supreme Court, the Court of Appeal and trial court concerning the conduct of business in California by Petitioner, through his duly authorized agents and representatives, compelled the finding of jurisdiction over Petitioner.

C. Petitioner's Conduct of Substantial Business in the State of California Through His Alter-Ego Corporations.

The systematic and continuous activities and contacts maintained in California by the alter-ego businesses of Petitioner may be imputed to Petitioner for purposes of asserting personal jurisdiction over him. *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1393 (9th Cir. 1984). In *Flynt*, the Ninth Circuit held that only a *prima facie* showing of the alter-ego relationship is required to support jurisdiction over an individual based upon his alter-ego corporation's substantial contact with California. *Id.* (*citing Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). In the instant case, a great volume of evidence was presented to the California Supreme Court, the Court of Appeal and the trial court

detailing Petitioner's alter-ego relationships and the substantial California business activities of the alter-ego corporations to support subjecting Petitioner to the jurisdiction of the state.

As established in the trial court below, Petitioner is a shrewd, sophisticated businessman who generally conducts his personal business affairs through numerous shell corporations, which have limited or no assets, so that Petitioner can run his business affairs and transfer assets with little public or private scrutiny. [Ilya Decl., ¶ 31, App. L11; Simmonds Decl., ¶ 44, App. M21]. Petitioner has not maintained a distinction or separation between the various corporate entities and himself [Ilya Decl., ¶ 32, App. L11; Simmonds Decl., ¶ 44, App. M21]; Petitioner has commingled his personal funds with the funds of the various corporations [Ilya Decl., ¶ 32, App. L11; Simmonds Decl., ¶ 44, App. M21]; and Petitioner has not maintained a separate identity of funds and assets [Ilya Decl., ¶ 32, App. L11; Simmonds Decl., ¶ 44, App. M21]. In sum, a *prima facie* case has been made that the corporate defendants are the alter-ego of Petitioner.

In the case at bar, the shell alter-ego corporations of Petitioner have had substantial and continuous contacts with California to subject Petitioner to the jurisdiction of the state. Christopher Columbus Productions, Inc., the production company formed by Petitioner for the Film, conducted substantial business in California related to the financing, production, distribution and exhibition of the Film. [Simmonds Decl., ¶¶ 5-6, App. M2-3, and Exhibit 1 thereto]. In addition, shell alter-ego corporate

Defendants Kandor Productions, Inc., Great Krypton Productions, Inc. and Superboy Productions, Inc.,[5] are putative corporations that were established by Petitioner to facilitate the business in California of production, financing and distribution of the series of "Superman" motion pictures and the "Superboy" television series. [Request for Judicial Notice, Exhibits 3, 4, 7, 8, 9, 10, 11, 12, 17, and 18, App. R14, item 36; Simmonds Decl., ¶¶ 30 through 38, App. M15-17]. Hence, the conduct of business in California by Petitioner's alter-ego corporations mandated a finding by the lower courts of jurisdiction over Petitioner.

IV.

THE CALIFORNIA COURT OF APPEAL DENIAL OF THE WRIT OF MANDATE DID NOT DEPRIVE PETITIONER OF DUE PROCESS OR EQUAL PROTECTION

After reviewing the 2,500-page trial court record consisting of overpowering evidence documenting the extensive business activities of Petitioner in California, the California Court of Appeal denied the Petition for Writ of Mandate and the California Supreme Court denied a Petition for Review. In this Court, Petitioner, in a last gasp of specious sophistry, claims that the denial of the Petition for Writ of Mandate was somehow in violation of Petitioner's due process and equal protection rights under the United States Constitution. Apparently, Petitioner claims, contrary to law, that no matter the delay or

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[5] As noted above, the motion to quash on behalf of these Defendants was voluntarily withdrawn and defaults against these Defendants have been entered by the trial court.

expense he should be afforded all the accouterments of a full-blown "appeal," including a complete briefing schedule, a formal oral argument and a rendition of a formal written opinion by the California Court of Appeal. Petitioner spuriously argues that on denial of his motion to quash based upon personal jurisdiction, appellate review through a statutory writ of mandate is insufficient for him, and that under the Due Process and Equal Protection Clauses of the Constitution he should be entitled to either (1) an interlocutory appeal or (2) an appeal after a trial on the merits. Petitioner's position is without support in the law and without merit.

Preliminarily, it should be noted that this Court has consistently held that if a full and fair hearing on the merits is provided, "it is clear that the State need not provide any appeal at all." *Ross v. Moffitt*, 417 U.S. 600, 611, 94 S. Ct. 2437, 2444 (1974); *see also Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) ("There is, of course, no constitutional right of appeal"); *McKane v. Durston*, 153 U.S. 684, 686, 14 S. Ct. 913, 914 (1894). Appellate procedures may be accorded by the state "upon such terms as in its wisdom may be deemed proper." *McKane*, 153 U.S. at 687-88, 14 S. Ct. at 914-15.

Historically, California has always provided a litigant with appellate review of a trial court's denial of a motion to quash based upon personal jurisdiction. *See, e.g., Jardine v. Superior Court*, 213 Cal. 301, 305, 2 P.2d 756, 758 (1931) (appellate review by writ of prohibition), *appeal dismissed*, 284 U.S. 592, 52 S. Ct. 197 (1932). Inspired by this Court's ruling in *International Shoe*, in the mid-1950s the Committee on the Administration of Justice of the

California State Bar (the "Committee") considered various means the Legislature could expedite the procedure for contesting *in personam* jurisdiction. 29 CALIF. S.B.J. 227 (1954); *see also* SENATE INTERIM JUDICIARY COMMITTEE, THIRD PROGRESS REPORT TO THE LEGISLATURE 16-18, 59-60 (1955). The Committee expressly discarded a possible procedure of preserving jurisdictional issues for appeal *after* trial on the merits, since it was felt that to require litigants to go through a trial and then a post-trial appeal would be too time consuming and wasteful of effort and expense that could be avoided if appellate review occurred at the pleading stage before trial. 29 CALIF. S.B.J. 227 (1954) Thus, the Committee recommended legislation that would allow early, expeditious appellate review and at the same time avoid the risk of a default judgment while the jurisdictional issue is being litigated. *Id.* at 228.[6]

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[6] It is interesting to note that a significant share of this Court's modern jurisprudence regarding personal jurisdiction has scrutinized the reach of California's long-arm statute. *McGee v. International Life Ins. Co.*, 335 U.S. 220, 78 S. Ct. 199 (1957); *Kulko v. California Superior Court*, 436 U.S. 84, 98 S. Ct. 1690 (1978); *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482 (1984); *Asahi Medal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026 (1987); *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S. Ct. 2105 (1990). In each of these cases, petitioners had their constitutional claim preserved pursuant to the California writ statute under review in the case at bar. In none of these California cases did this Court criticize or question the appropriateness of the California procedure of appellate review by way of petition for writ of mandate under *Code of Civil Procedure*, Section 418.10 or its predecessors.

As a result of the Committee's work, in 1955 the California Legislature enacted *Code of Civil Procedure*, Section 416.3,[7] which sets forth the procedure for appellate review of a trial court's denial of a motion to quash through the mechanism of a petition for writ of mandate. The California Supreme Court explained the philosophy of appellate review of jurisdictional issues by way of writ proceedings before trial in *McCorkle v. City of Los Angeles*, 70 Cal.2d 252, 257-58, 75 Cal.Rptr. 389, 393-94 (1969):

> "the Legislature intended (1) that the section would provide a method of obtaining appellate review of the order [denying a motion to quash] here in question, and (2) that the availability of the interlocutory appellate remedy would, accordingly, preclude review of the order upon appeal from a judgment entered after trial on the merits. Before section 416.3 was enacted, moreover, the rule was that the unsuccessful moving party waived his jurisdictional objection entirely if he made a general appearance after his motion was denied. Section 416.3 was intended to forestall this consequence by permitting the moving party to defer a general appearance while pursuing the interlocutory appellate remedy, but the section does not relieve him of the consequences if he makes the appearance."[8]

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[7] This statute is the predecessor of the current California *Code of Civil Procedure*, Section 418.10. [App. T2].

[8] Throughout his Petition, Petitioner misrepresents California's statutory appellate review procedure as exemplifying the "harsh rule." However, Petitioner's characterization of California's statutory scheme is inaccurate since California permits interlocutory appellate review of the jurisdictional

Constitutional procedural due process limits a state from restricting litigants' use of adjudicatory procedures only when such state action would be " 'equivalent to denying them an opportunity to be heard . . . ' " *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 1154 (1982) (*quoting Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct. 780, 787 (1971)). In this case, Petitioner has had "an opportunity to be heard" through his motion to quash and his Petitions for Writ of Mandate and for Review. Although Petitioner may desire to further delay this case by filing extensive appellate briefs, engaging in lengthy oral argument before the Court of Appeal and requiring the appellate court to provide an extensive written opinion, such procedures are not mandated by the Due Process Clause.[9] *Id.*

Under well-settled equal protection jurisprudence, California's method of appellate review by statutory writ of mandate is subject to this Court's most deferential standard of review and " 'presumed to be valid and will be sustained if the classification . . . is rationally related to

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determination. *Developments in the Law, State Court Jurisdiction*, 73 HARV. L. REV. 909, 993 (1960).

[9] This Court can take judicial notice of its own busy calendar and the overburdened calendar of the appellate courts of California. If full formal briefing, oral argument and formal written opinions were required in every mandate proceeding in California, the log-jam of cases would paralyze the workload of the appellate courts in California. It should be further noted that the California Rules of Court do not require a published opinion even in cases that go through the formal appeal process and this Court is not required to publish a full opinion every time it denies a petition for writ of certiorari. CAL. RULES OF COURT 976(b) (1994).

a legitimate state interest.' " *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 81, 108 S. Ct. 1645, 1652 (1988) (*quoting Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985)). Since the Legislature has the exclusive authority to determine the method of review, and there is no basis whatsoever (and no authority has been cited) for Petitioner to claim that the California procedure for appellate review is anything but appropriate and constitutional under the Equal Protection Clause [*see generally McKane*, 153 U.S. at 687-88, 14 S. Ct. at 914-15], Petitioner's attempt to raise colorable constitutional issues must fail.

California's desire to preserve judicial resources and avoid the delay and expense of a protracted trial before appellate review certainly has a rational connection to the statute's objective so as to be sustained under an equal protection analysis. *Bankers Life and Casualty Co.*, 486 U.S. at 83, 108 S. Ct. at 1653. Furthermore, contrary to the erroneous suggestion of Petitioner, the California statutory procedure for appellate review of denial of a motion to quash does not distinguish between residents and non-residents. *Id.* For instance, if a California resident's motion to quash for lack of jurisdiction, based upon improper service of process, were denied by a trial court, a California resident would have the same exact options for appellate review by way of petition for writ of mandate under that same Section 418.10 as a non-resident has for appellate review. Consequently, there is no discrimination between residents and non-residents with respect to appellate review of denials of motions to quash. As discussed in *Bankers Life*, the Equal Protection Clause

does not prohibit California from providing such appellate review based on the Legislature's rational conclusion that valuable judicial resources and costs of litigants would be better preserved if appellate review occurred quickly and early at the pleading stage, through a writ proceeding, rather than through a protracted pretrial interlocutory appeal or a long-delayed post-trial appeal.

In re Taya C., 2 Cal.App.4th 1, 2 Cal.Rptr.2d 810 (1991), is an analogous case where petitioners argued that the exclusive review of a trial court order by means of a California statutory writ proceeding was unconstitutional because such procedure violated their due process and equal protection rights. In upholding the constitutionality of the statute and ruling that the appellate review by means of writ proceedings established by the Legislature did not violate petitioners' constitutional rights, the California Court of Appeal concluded:

> " . . . The right of a party to appeal, however, is wholly statutory and no judgment or order is appealable unless expressly made so by statute . . . Because the Legislature has complete control over the right to appeal, it can restrict, change, withhold or even abolish that right . . . Appeals in juvenile proceedings have long had preference over all other pending appeals. By enacting [*Welfare & Institutions Code*] section 366.26, subdivision (k), the Legislature chose an even more expeditious method [writ proceedings] for appellate review of a decision to refer a child to a permanent placement hearing.
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> In specifying review of the referral order by petition for extraordinary writ, the Legislature

> has afforded [petitioners] a speedy review, before the child has lived and developed ties in a permanent setting. Review by extraordinary writ is thus a rational choice compared with review by appeal . . .
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> * * *
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> *Although review by petition for writ is often characterized as summary, summary does not mean cursory. As an original proceeding, the appellate court has access to the record and a variety of options, including issuing a stay, the alternative writ or an order to show cause. While argument and a written opinion are constitutionally required only when a petition becomes a cause, we find no authority holding a petitioner is denied due process by lack of a reply brief, oral argument or petition for rehearing,* and thus substantive review by writ application as prescribed in section 366.26, subdivision (k) complies with due process."

Id. at 6-9, 2 Cal.Rptr.2d at 812-14 (citations omitted) (emphasis added).

As in the case of *In re Taya C.*, Petitioner in this matter should not complain that by enacting California *Code of Civil Procedure*, Section 418.10 the Legislature has afforded Petitioner a "speedy review" that is a rational choice compared to a delaying interlocutory appeal or appeal after an expensive and time consuming trial. *In re Taya C.*, 2 Cal.App.4th at 7, 2 Cal.Rptr.2d at 813. It is certainly not an arbitrary or capricious decision violative of procedural due process that "the Legislature chose an even more expeditious method for appellate review of the decision" of the trial court denying a motion to quash. *Id.* Unless Petitioner's only interest is in obstructionist delay,

Petitioner should be pleased that he is able to obtain quick appellate review of the issue of jurisdiction through a writ proceeding, rather than have to suffer the long delay and expense of the alternative formal appellate review.

Moreover, as noted by the court in the case of *In re Taya C.*, appellate review by a writ proceeding does not mean cursory, arbitrary or capricious review. The appellate court in this case had access to the complete 2,500-page trial court record and had "a variety of options, including issuing a stay, the alternative writ or an order to show cause." *Id.* at 9, 2 Cal.Rptr.2d at 814. After careful review of the record and an analysis of the law and facts, the Court of Appeal denied the Petition for Writ of Mandate and Stay. It is the height of presumptuousness and arrogance for Petitioner to suggest that the Court of Appeal did not give full consideration to Petitioner's writ proceedings so as to violate procedural due process. Petitioner's problem is not that the Court of Appeal failed to carefully consider and evaluate all of the issues raised on the writ; Petitioner's difficulty is that the Petition for Writ of Mandate was supported neither by the law nor by facts. Disappointment with a decision does not equate to deprivation of due process or equal protection.

V.

CONCLUSION

The overwhelming preponderance of evidence in the trial court established that Petitioner was doing business in the State of California on a systematic and continuous basis to make him amenable to the jurisdiction of the state. A review of the 2,500-page trial court record by the California Court of Appeal and the California Supreme Court sustained that finding by the denials of the Petitions for Writ of Mandate and for Review. Since the method of appellate review established by the California Legislature for denials of a motion to quash is not a violation of due process or equal protection, Real Parties in Interest respectfully urge this Court to deny the Petition for a Writ of Certiorari.

DATED: March 31, 1995

Respectfully submitted,

CHRYSTIE & BERLE
A Professional Corporation
ELIHU M. BERLE

Other Counsel
STEPHEN CHRYSTIE
DAVID BOYLE

Attorneys for Real Parties in Interest Jane Chaplin, Ilya Salkind and Robert Simmonds